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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )	
FOR EXTENSION OF TIME ON BENEFICIAL )	FINAL ORDER
WATER USE PERMIT NO. 49605-s41G )	
BY GLENDA AND GERALD OHS )	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 7, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

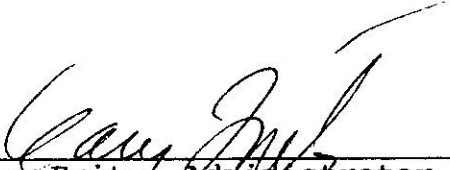
The Application for Extension of Time to Perfect Beneficial Water Use Permit No. 49605-s41G by Gerald and Glenda Ohs is hereby granted. The Permittee shall complete the appropriation works and put water to a beneficial use as specified in the Permit on or before November 30, 1991. The Notice of Completion of Permitted Water Development, Form 617, shall be filed with the Department on or before November 30, 1991.

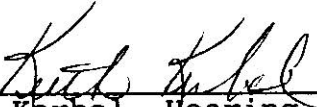
**CASE # 49605**

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 25<sup>TH</sup> day of May, 1989.

  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
Keith Kerbel, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1537 Avenue D, Suite 105  
Billings, Montana 59102  
(406) 657-2105

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 25<sup>TH</sup> day of May, 1989, as follows:

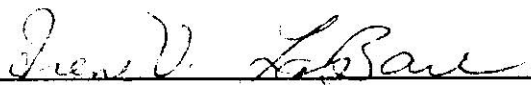
Glenda and Gerald Ohs  
P.O. Box 152  
Harrison, MT 59735

George L. and Gwynn Taylor  
P.O. Box 6383  
Los Osos, CA 93412

Anna Lee Purdy  
508 North 15th  
Bozeman, MT 59715

Scott Compton, Field Manager  
Bozeman Field Office  
1201 East Main  
Bozeman, MT 59715

Kathleen A. Cullen  
Attorney at Law  
P.O. Box 1271  
Bozeman, MT 59771-1271

  
Irene V. LaBare  
Legal Secretary

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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION            )  
FOR EXTENSION OF TIME ON BENEFICIAL        )       PROPOSAL FOR DECISION  
WATER USE PERMIT NO. 49605-S41G            )  
GRANTED TO GLENDA & GERALD OHS            )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 17, 1989 in Bozeman, Montana.

Applicant for Extension of Time, Glenda and Gerald Ohs (hereafter referred to as Applicant), appeared in person at the hearing without counsel. Mr. Rhett Hurless appeared as witness for the Applicant.

Objector, Anna Lee Purdy, appeared at the hearing in person. Objectors, George L. and Gwynn M. Taylor, were not present. Objectors, Ms. Purdy and George and Gwynn Taylor, were represented by Counsel, Kathleen Cullen, attorney at law.

Scott Compton and Jan Mack, both with the Bozeman Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, the "Department"), were present at the hearing.

**CASE # 49605**

### EXHIBITS

Applicant offered two exhibits for inclusion in the record.

Applicant's Exhibit 1, an order issued January 29, 1988, granting an Extension of Time to the Applicant for the completion of the Cataract Creek Project from the Federal Energy Regulatory Commission (hereafter referred to as FERC) was admitted without objection.

Applicant's Exhibit 2 is a photocopy of a letter from Charles R. Lee of 2900 Development Corp. to Gerald Ohs dated February 11, 1989. An objection was made to the relevancy of this letter with regard to issuing an Extension of Time.

### PRELIMINARY MATTERS

1. An objection was raised by counsel for the Objectors as to the relevance of the testimony presented regarding the issue of financing to the granting of an Extension of Time. This issue was again raised by the Objectors when Exhibit No. 2 was introduced into the record. I will address both objections raised as one issue.

Attempting to locate available financing for water development projects is an integral part of any construction project and may be used to show that the Applicant is proceeding with diligence. Individuals without ample resources must find alternative sources of revenue to help pay initial costs incurred during planning, development and construction of hydropower

projects. Therefore, the objection raised concerning the relevance of financing in the Applicant's testimony and in Exhibit No. 2 is hereby overruled.

After consideration of the evidence presented in this matter, and now being fully advised in the premises, the Examiner proposes the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

1. Section 85-2-312(3) MCA states in pertinent part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. On February 28, 1983, Permit to Appropriate Water No. 49605-s41G was granted to Glenda and Gerald Ohs with a priority

date of October 20, 1982. The Applicant was required under the terms of the Permit to have completed the appropriation works and have applied water to a beneficial use as specified in the Permit, on or before October 1, 1985 and file a Notice of Completion of Permitted Water Development Form on or before December 1, 1985.

3. On July 17, 1985, the Applicant requested additional time to complete the project as permitted. The main reason for needing more time was because their exemption from FERC was withdrawn due to no fault of the Applicant. Consequently, the Applicant was then involved in the process of having to resubmit an application to FERC for a minor license. On July 19, 1985, the Applicant therefore was granted an Extension of Time to perfect the appropriation on or before December 1, 1988.

4. The original exemption from FERC was issued on May 2, 1984, and was withdrawn by FERC shortly thereafter, prompting the Applicant to once again make application to FERC under somewhat different criteria. On May 25, 1985, FERC accepted their application for a minor license, and required additional information. The requested information was mailed and apparently not received by FERC, who then dismissed their application for a minor license. In November of 1985, the Applicant's application for a minor license was reinstated after a hearing with FERC was held.

On December 13, 1985, the minor license was issued. On September 10, 1986, and on May 11, 1987, the Applicant mailed to

FERC reports to meet portions of the requirements of the minor license. This process has included communications from and responses with thirteen (13) local, state, and federal agencies to meet certain requirements addressed in the FERC license and with other agencies.

5. In concert with this project, the Applicant has been involved with constructing another hydropower plant under Provisional Permit No. 53070-s41G, on North Willow Creek. Construction on the North Willow Creek project actually started in June of 1988 and was completed in December, 1988. This project had a signed contract for the sale of power to Montana Power Company which did not include the Cataract Creek project. Applicant is currently exploring other avenues for the sale of power from this project (Exhibit 2).

6. On September 20, 1988, the Applicant requested a second Extension of Time. A temporary extension was subsequently granted on December 13, 1988. The pertinent portions of the Application for Extension of Time was published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on October 26, 1988.

7. The application received timely objections from George L. and Gwynn M. Taylor and Anna Lee Purdy. Anna Lee Purdy's objection alleges adverse effect to her water rights; and Taylor's objection alleges a lack of diligence on behalf of the Applicant on this project, that the flows are not sufficient in the source, that the permitted flow is overstated and that there

is a lack of need for additional electrical power in the Pony, Montana area at present or in the future. The main objection presented at the hearing focused on the issue of a lack of diligence by the Applicant in perfecting this permit since no physical on-site construction exists, no financing on this project has been obtained, nor have any contracts been signed for the sale of the power.

8. On January 29, 1988, FERC granted an Extension of Time to the Applicant for the Cataract Creek Project. The extension requires commencing construction by December 12, 1989, and completing construction by December 12, 1991. (Exhibit 1).

9. No physical on site construction activities have been started on this project, except for the placement of a weir to measure flows in the source. Testimony by the Applicant showed construction cannot be started until the articles under the minor license are fulfilled. There are two articles as yet to meet.

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner.

3. The Applicant for the Extension of Time must show reasonable diligence of good faith effort towards the completion

of the appropriation works and putting water to a beneficial use. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-s76M Transferred to Marvin and Mary Ann Rehbein, Proposal for Decision, June 16, 1988, pp. 5-9 (Final Order, January 24, 1989).

4. Granting of a previous extension is prima facie evidence of reasonable diligence on the part of the Applicant prior to that extension. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 24875-q41H, City of Belgrade, Proposal for Decision, pp. 6-7.

5. Reasonable diligence is the steady good faith effort toward perfecting the permit. The record shows that the Applicant has pursued completing the project since the last Extension of Time was issued. The record shows there has been a couple of setbacks in their FERC application process. Neither appear to have been through any fault of the Applicant. The first was the result of their exemption being dismissed because of a court decision affecting all exemptions in the FERC process. The second setback was that during the processing of their minor license, their documents were lost. However, FERC, through their administrative hearings process, reinstated the Applicant's application and ultimately issued a minor license to them in December 1985. These setbacks have delayed the project and probable cause for the loss of their financing. Since the issuance of the minor license, the Applicant has been addressing

certain FERC requirements which involve several communications with state, local and other federal agencies.

Based on the foregoing, the Examiner concludes that the Applicant has exercised reasonable diligence. Thus, there is good cause to grant an extension.

WHEREFORE, the Examiner proposes the following:

#### PROPOSED ORDER

The Application for Extension of Time to Perfect Beneficial Water Use Permit No. 49605-s41G by Gerald and Glenda Ohs is hereby granted. The Permittee shall complete the appropriation works and put water to a beneficial use as specified in the Permit on or before November 30, 1991. The Notice of Completion of Permitted Water Development, Form 617, shall be filed with the Department on or before November 30, 1991.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

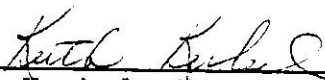
Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is

present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 7th day of April, 1989.

  
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Keith Kerbel, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1537 Avenue D, Suite 105  
Billings, MT 59102

**CASE # 49605**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. P049605-s41G granted to Glenda & Gerald Ohs was duly served upon all parties of record at their address or addresses this 17th day of April, 1989, as follows:

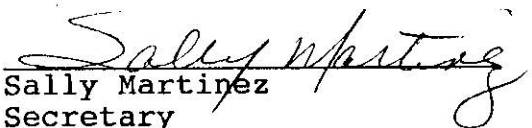
Gerald & Glenda Ohs  
P.O. Box 152  
Harrison, MT 59735

Anna Lee Purdy  
508 No. 15th  
Bozeman, MT 59715

Scott Compton  
Field Office Manager  
Bozeman Field Office  
1201 East Main  
Bozeman, MT 59715

George L. & Gwynn M. Taylor  
P.O. Box 6383  
Los Osos, CA 93412

Kathleen A. Cullen, Atty.  
P.O. Box 1271  
Bozeman, MT 59711-1271

  
Sally Martinez  
Secretary

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